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# Mens Rea in Minnesota and the Model Penal Code

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## MENS REA IN MINNESOTA AND THE MODEL PENAL CODE

Ted Sampsell-Jones<sup>†</sup>

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### I. INTRODUCTION

When Minnesota engaged in the great reform and recodification effort that led to the Criminal Code of 1963, it was part of a nationwide reform movement. That movement was spurred in large part by the American Law Institute and its Model Penal Code. The Minnesota drafters were influenced by the MPC and, at least in some areas, adopted MPC recommendations.

The MPC's most significant innovation was in the law of mens rea—the body of law concerning the mental state or “guilty mind” necessary for criminal liability. The MPC drafters recognized that the common law of mens rea was fundamentally incoherent and had been a constant source of confusion for courts. The MPC drafters therefore created a bold new mens rea framework.

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Minnesota, however, did not adopt that framework. Instead, the drafters of the 1963 Code attempted smaller changes, and since then, Minnesota courts have continued to rely heavily on the common law of mens rea. As a result, the same mens rea problems that befuddled old common law courts linger in Minnesota today. These problems cause needless confusion and unpredictability in the criminal law. It is time for Minnesota to enact further reforms to move the code closer to the MPC mens rea framework.

## II. MENS REA UNDER THE MPC AND THE MINNESOTA CRIMINAL CODE

### A. *The Creation of the MPC*

The early and mid-twentieth century was the heyday of the American Law Institute, which led a broad movement to reform and rationalize the law. From the 1920s to the 1940s, the ALI produced enormously influential Restatements in several areas of law.

In the early 1950s, the ALI turned its attention to the criminal law. The ALI determined that the criminal law in America was fractured and inconsistent, with a great deal of jurisdictional variation, and also that American criminal law was sometimes senseless.<sup>1</sup> It determined that a Restatement of Criminal Law was neither possible nor wise. The ALI therefore set out to produce a model criminal code instead. Indeed, its lofty goal was to produce an “ideal penal code.”<sup>2</sup> A dozen years of study and drafting, led by Chief Reporter Herbert Wechsler, led to the 1962 adoption of the Model Penal Code.<sup>3</sup>

The MPC was intended to stimulate legislative reform around the country. The drafters’ goal was that state legislators would adopt the provisions of the MPC, leading to a more uniform and more sensible criminal law in the United States.<sup>4</sup> To a substantial extent, they succeeded. Many states adopted the MPC at least in large part.<sup>5</sup> And although its influence may have waned over the

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1. Herbert Wechsler, *Codification of Criminal Law in the United States: The Model Penal Code*, 68 COLUM. L. REV. 1425, 1425–26 (1968).

2. Herbert Wechsler, *A Thoughtful Code of Substantive Law*, 45 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 524, 525 (1955).

3. MODEL PENAL CODE (1962).

4. Wechsler, *supra* note 1, at 1427.

5. See Herbert Wechsler, *Foreword* to MODEL PENAL CODE AND COMMENTARIES

decades, the MPC remains a canonical source in criminal jurisprudence.<sup>6</sup> It still forms the basis of many states' criminal codes. It is still cited regularly by courts around the country. It is still taught to most law students around the country and tested on the bar exam. It has been widely praised by scholars: "The Code itself was stunningly successful in accomplishing the comprehensive rethinking of the criminal law that Wechsler and his colleagues sought."<sup>7</sup>

The MPC was perhaps most influential in its approach to mens rea—the mental state that a defendant must possess to be guilty of a crime.<sup>8</sup> For centuries, courts had said that mens rea was a fundamental feature of the criminal law.<sup>9</sup> "A critical facet of the individualized determination of culpability required in capital cases is the mental state with which the defendant commits the crime."<sup>10</sup> Indeed, the presence of a guilty mind (*animo felonico*) was said to be the defining feature of criminal law—the thing that makes criminal law different from other areas, such as tort law,<sup>11</sup> the thing that justifies sanctions including imprisonment and death rather than mere monetary penalties.<sup>12</sup> But the MPC drafters, building on the work of early and mid-twentieth century legal scholars,<sup>13</sup> recognized

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(OFFICIAL DRAFT AND REVISED COMMENTS), at xi (1985).

6. Geoffrey C. Hazard, Jr., *Tribute in Memory of Herbert Wechsler*, 100 COLUM. L. REV. 1362, 1362 (2000) ("The MPC has since become the standard for discourse concerning criminal law, both in academic analysis and in reform legislation.").

7. Sanford H. Kadish, *Codifiers of the Criminal Law: Wechsler's Predecessors*, 78 COLUM. L. REV. 1098, 1140 (1978).

8. Ronald L. Gainer, *The Culpability Provisions of the Model Penal Code*, 19 RUTGERS L.J. 575, 575 (1988) ("The Code's provisions concerning culpable mental states introduced both reason and structure to a previously amorphous area of Anglo-American law.").

9. See 4 WILLIAM BLACKSTONE, COMMENTARIES \*21 ("So that to constitute a crime against human laws, there must be, first, a vicious will; and secondly, an unlawful act consequent upon such vicious will."). For an overview of the development of mens rea law in English legal history, see Paul H. Robinson, *A Brief History of Distinctions in Criminal Culpability*, 31 HASTINGS L.J. 815, 821–50 (1980).

10. *Tison v. Arizona*, 481 U.S. 137, 156 (1987).

11. A.K.R. KIRALFY, POTTER'S OUTLINES OF ENGLISH LEGAL HISTORY 156, 158, 163–65 (5th ed. 1958).

12. See generally H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 20–28 (1968); cf. OLIVER WENDELL HOLMES, THE COMMON LAW 3 (1923) ("[E]ven a dog distinguishes between being stumbled over and being kicked.").

13. See, e.g., Walter Wheeler Cook, *Act, Intention, and Motive in the Criminal Law*, 26 YALE L.J. 645 (1917); Rollin M. Perkins, *A Rationale of Mens Rea*, 52 HARV. L. REV. 905 (1939); Francis Bowes Sayre, *Mens Rea*, 45 HARV. L. REV. 974 (1932); Francis Bowes Sayre, *The Present Signification of Mens Rea in the Criminal Law*, in HARVARD LEGAL ESSAYS 399, 411–12 (1934); Glanville Williams, *The Mental Element*

that the common law's approach to mens rea was often confused, unpredictable, and unprincipled.

American law has employed an abundance of *mens rea* terms, such as general and specific intent, malice, wilfulness, wantonness, recklessness, scienter, criminal negligence, and the like—exhibiting what Mr. Justice Jackson in a famous Supreme Court opinion called “the variety, disparity and confusion” of “definitions of the requisite but elusive mental element.”<sup>14</sup>

They therefore proposed a bold and comprehensive new framework for handling mens rea issues.

#### B. *The MPC's Mens Rea Framework*

The drafters of the MPC saw the common law mens rea structure as fundamentally broken. Rather than try to fix it, they started over. Their new structure had several foundational elements.<sup>15</sup>

First, they created a new mens rea vocabulary. The common law had developed dozens of different mens rea terms.<sup>16</sup> Some of these terms, such as “malice,” were vague and encrusted with hundreds of years of confusing case law.<sup>17</sup> Others, such as “general intent,” had been used to mean different things at different times in different jurisdictions.<sup>18</sup> The MPC thus abandoned the very concept of “specific intent” and “general intent” in the criminal law

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in *Crime*, 27 REV. JUR. U.P.R. 193 (1957).

14. Wechsler, *supra* note 1, at 1436 (quoting *Morrisette v. United States*, 342 U.S. 246 (1952)).

15. For a general discussion and evaluation of the MPC's mens rea innovations, see Paul H. Robinson & Jane A. Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681 (1983).

16. See Kenneth R. Feinberg, *Toward a New Approach to Proving Culpability: Mens Rea and the Proposed Federal Criminal Code*, 18 AM. CRIM. L. REV. 123, 125 (1980).

17. MODEL PENAL CODE AND COMMENTARIES § 2.02 cmt. 1 (1985). The commentary to section 2.02 noted that studies had revealed seventy-six different methods of describing mens rea in the federal criminal code alone. See *id.* § 2.02 n.3 (citing 1 Brown Commission Working Papers 119–20 (1970)).

18. See *id.* § 2.02 n.3 (describing the distinction between specific and general intent as “an abiding source of confusion and ambiguity in the penal law”); see also *United States v. Bailey*, 444 U.S. 394, 403 (1980) (“This venerable distinction . . . has been the source of a good deal of confusion.”); GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* § 6.5, at 452–53 (2000) (describing at least three different meanings of the phrase “specific intent” and at least four meanings of “general intent” in the case law); JEROME HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 142 (2d ed. 1960) (criticizing the distinction).

based on the recognition that it had been “the source of endless confusion in the courts.”<sup>19</sup> In the view of the MPC drafters, the mens rea vocabulary of the common law contained too many options, not enough of which had a clear legal meaning.

They thus adopted a mens rea menu consisting of four possible selections: purposefully, knowingly, recklessly, and negligently.<sup>20</sup> The list is hierarchical: each represents a different level of culpability.<sup>21</sup> Each has a fairly straightforward definition that can be applied to different crimes and different contexts. Thus, for any given criminal statute, a legislature may choose which of the four levels of culpability is appropriate for the offense. Strict liability is a fifth option, but a disfavored one.<sup>22</sup> The MPC mens rea vocabulary is clearer than the old common law vocabulary. It is simpler than the old common law vocabulary. And yet at the same time, it also provides legislatures with a broad spectrum of mens rea options.

Second, the MPC drafters adopted the “elements approach” to mens rea.<sup>23</sup> Common law courts generally approached mens rea questions on the assumption that each *offense* had some single mens rea requirement. The MPC, by contrast, recognizes that each *element* of a crime could have its own independent mens rea requirement and thus that a single crime can have multiple mens rea requirements.<sup>24</sup>

The common law “offense” approach led to problems because when a crime had multiple elements, there was no easy way to determine where the mens rea attached. Consider an offense prohibiting killing a bald eagle. Does the mens rea attach to the act of killing or the fact that the victim is a bald eagle? One defendant might intend to kill an animal but not know it is a bald eagle; another defendant might know the animal in front of her is a bald eagle but only kill it accidentally. Which is guilty? The common law approach was generally to specify some single mens

19. SANFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES 215–16 (7th ed. 2001).

20. MODEL PENAL CODE § 2.02(2) (1962).

21. For a criticism of the MPC’s hierarchical approach to mens rea, see Kenneth W. Simons, *Rethinking Mental States*, 72 B.U. L. REV. 463 (1992).

22. MODEL PENAL CODE AND COMMENTARIES § 2.04(5) & cmt. 4.

23. See Robinson & Grall, *supra* note 15, at 693–96.

24. MODEL PENAL CODE § 2.02(1) (“[A] person is not guilty of an offense unless he acted purposely, knowingly, recklessly or negligently, as the law may require, *with respect to each material element of the offense*.” (emphasis added)).

rea for the offense, but then (in some circumstances) allow additional defenses for “mistakes.” For example, a defendant might not be guilty of the bald eagle offense if she reasonably but mistakenly believed that the bird she shot was a duck. But the various mistake doctrines were confusing and inconsistently applied.

Relatedly, the MPC drafters correctly recognized that mistake doctrine was not truly distinguishable from mens rea doctrine but was rather just a roundabout way of approaching mens rea for certain elements.<sup>25</sup> At common law, courts would occasionally state that a crime had a single mens rea but then would also make defenses available for “mistakes of fact.”<sup>26</sup> Thus, for the eagle statute above, courts would sometimes treat the offense as having a single mens rea (intentionally killing something), but then also say that a defendant was not guilty if he was reasonably mistaken about the type of bird. In short, courts sometimes treated mistake of fact as “a separate and distinct issue notwithstanding its relation to the State’s duty to prove a criminal intent.”<sup>27</sup>

The MPC drafters recognized that mistake doctrine is not, in fact, conceptually distinct from criminal intent. Saying “a defendant is not guilty if she made a reasonable mistake about the type of bird” is no different from saying “a defendant is guilty if she knew or should have known it was an eagle.” The MPC thus abandoned mistake as an independent mens rea doctrine.<sup>28</sup> Instead, it simply recognized that offenses have multiple elements and that each element might have a mens rea requirement attached to it.<sup>29</sup> Thus, as to each element, the legislature can choose the appropriate requirement by choosing from the four-item mens rea menu.

Third, the MPC adopted default rules for filling in a mens rea requirement when it is not clearly specified by the legislature. In common law jurisdictions, courts often struggled to define what (if any) mens rea requirement to adopt when the legislature failed to speak clearly. They developed a variety of doctrines aimed at

25. Kenneth W. Simons, *Should the Model Penal Code’s Mens Rea Provisions Be Amended?*, 1 OHIO ST. J. CRIM. L. 179, 181 (2003).

26. See WAYNE R. LAFAVE, CRIMINAL LAW § 5.6 (4th ed. 2003).

27. State v. Freeman, 267 N.W.2d 69, 71 (Iowa 1978).

28. MODEL PENAL CODE AND COMMENTARIES § 2.04(1) & cmt. 1 (1985) (“In other words, ignorance or mistake has only evidential import . . .”).

29. Peter W. Low, *The Model Penal Code, the Common Law, and Mistakes of Fact*, 19 RUTGERS L.J. 539, 545–47 (1988).

specifying when a crime could be treated as a strict-liability offense, and when mens rea would be read in. But those doctrines failed to yield consistent results.

The MPC replaced that system with a mechanical default presumption of statutory interpretation. Essentially, the default rule is recklessness.<sup>30</sup> If the legislature in an MPC jurisdiction fails to specify a mens rea standard in an offense, then courts must assume a requirement of recklessness as to each element.<sup>31</sup> Alternatively, if the legislature only specifies a mens rea requirement for one element, then courts must apply that same requirement to each element of the offense, unless a contrary intention plainly appears. Of course, it remains the legislature's prerogative to specify whatever mens rea it chooses, or none at all, for each element of the offense. But the MPC default rules solve most of the problems that arise when the legislature fails to speak clearly. They also set a background presumption that the legislature can choose to modify or not.

In those ways (and others), the MPC sought a major overhaul of the law of mens rea. The MPC's mens rea reforms were both highly rational and also highly pragmatic. The MPC drafters' influence on the law of mens rea has been enormous—their contribution was “to bring thought and order to the resolution of these questions and to dispel the obscurantist cloud that hung for so long on the central mens rea issues in criminal law.”<sup>32</sup> Though certainly open to criticism in some respects, the MPC's mens rea framework was “a vast improvement over the previous disorder” of the common law.<sup>33</sup>

### C. *Mens Rea in the Minnesota Criminal Code of 1963*

Many states adopted the MPC's mens rea framework,<sup>34</sup> but Minnesota did not. The Minnesota Criminal Code of 1963 was drafted and enacted in the shadow of the MPC, and there is no doubt that the Minnesota drafters were influenced by the MPC in

30. MODEL PENAL CODE § 2.02(3) (1962).

31. More specifically, when no mens rea is specified, a defendant is guilty if he acts purposely, knowingly, or recklessly as to that element. In other words, the default rule is “recklessness or above.”

32. Kadish, *supra* note 7, at 1143.

33. Robinson, *supra* note 9, at 816.

34. See MODEL PENAL CODE AND COMMENTARIES § 2.02 cmt. 1, n.4 (1985) (listing states that have adopted standards of culpability similar to MPC standards); Robinson, *supra* note 9, at 815–16.



many respects.<sup>35</sup> The drafters of the Minnesota Code adopted portions of the MPC—for example, Minnesota adopted the basic MPC definition of attempt liability.<sup>36</sup>

Like the MPC drafters, the Minnesota drafters recognized that the common law approach to mens rea was inconsistent and confusing. Maynard Pirsig's explanation for the code's approach to mens rea echoed the same criticisms of the common law voiced by Herbert Wechsler and others.

To avoid present confusion, an attempt was also made to state more clearly than do present statutes the particular criminal intent or purpose required for each particular crime. Terms in the present statutes such as "willful," "maliciously," "knowingly," and "wantonly" have produced much confusion and uncertainty as to what mental state is intended.<sup>37</sup>

But though the Minnesota drafters recognized the problems of common law mens rea that had led to the MPC's proposed mens rea reforms, Minnesota drafters did not buy the entire MPC package. To be sure, the Minnesota Code displays hints of MPC influence on mens rea, but Minnesota stopped far short of adopting the bold new MPC framework. Perhaps the change seemed too radical, especially given that no other state had yet implemented the MPC's approach to mens rea. The Minnesota Criminal Code of 1963 thus contained some new mens rea provisions reflecting more cautious, more incremental reforms.

First, the Minnesota drafters did attempt to adopt a more clear mens rea vocabulary. Like the MPC drafters, the Minnesota drafters recognized that the common law vocabulary was at times rococo and confusing. So like the MPC drafters, the Minnesota drafters created more straightforward definitions of common mens rea terms. The Minnesota drafters defined the two basic terms "intentionally" and "know,"<sup>38</sup> and their definitions were similar to the definitions of "purposefully" and "knowingly" used by the

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35. Maynard E. Pirsig, *Proposed Revision of the Minnesota Criminal Code*, 47 MINN. L. REV. 417, 424 (1962) ("The ten year study devoted to the preparation of the Model Penal Code by the American Law Institute indicates recognition of the need for improvement in the criminal codes of this country by a national organization of judges and lawyers.").

36. Compare MINN. STAT. § 609.17 (2012), with MODEL PENAL CODE § 5.01 (1962).

37. Pirsig, *supra* note 35, at 422.

38. MINN. STAT. § 609.02, subdiv. 9(2)–(3).

MPC.<sup>39</sup>

But the Minnesota drafters defined only those two terms—no provisions suggested or defined other mens rea possibilities, such as recklessness or negligence. Moreover, the Minnesota drafters did not attempt to apply their defined menu across all crimes. Several crimes retained archaic common law mens rea terminology. For example, they retained a form of murder based on acts “evinced a depraved mind,”<sup>40</sup> and they retained a form of manslaughter based on “culpable negligence.”<sup>41</sup> Neither “depraved mind” nor “culpable negligence” was defined anywhere in the code. In sum, although the Minnesota drafters defined certain mens rea terms, they did not follow the MPC in defining a fixed menu of mens rea options applicable to all crimes.

Second, unlike the MPC, the Minnesota Code did not adopt the elements approach to mens rea.<sup>42</sup> Unlike the MPC, the Minnesota Code contained no recognition of the different types of elements of an offense. Unlike the MPC, the Minnesota Code contained no statement that a mens rea requirement could attach to each element of an offense. In fact, certain statements suggested a desire to maintain the common law “offense” approach.<sup>43</sup> Nor did the Minnesota Code make any effort to address the mistake-of-fact doctrine. The only mistake doctrine contained in the code is a general statement of the hoary principle that ignorance of the law is not a defense.<sup>44</sup>

Third, the Minnesota drafters appeared to create an interpretive default rule of strict liability. But the rule is less than clear. Subdivision 9(1) of section 609.02 states: “When criminal intent is an element of a crime in this chapter, such intent is indicated by the term ‘intentionally,’ the phrase ‘with intent to,’ the phrase ‘with intent that,’ or some form of the verbs ‘know’ or ‘believe.’”<sup>45</sup> The implication of that statement is that when no such term is included in the definition of an offense, criminal intent is

39. MODEL PENAL CODE § 2.02(2)(a)–(b).

40. MINN. STAT. § 609.195(a).

41. *Id.* § 609.205(1).

42. See Robinson & Grall, *supra* note 15, at 688 & n.32 (identifying Minnesota as one of the jurisdictions that continues to maintain the “offense analysis” of mens rea, “under which each offense has one state of mind requirement”).

43. See § 609.02, subdiv. 9(1) (“When criminal intent is an element of a crime in this chapter . . .” (emphasis added)).

44. *Id.* § 609.02, subdiv. 9(5) (“Criminal intent does not require proof of knowledge of the existence or constitutionality of the statute . . .”).

45. *Id.*

not an element of the offense. Thus, whereas the MPC adopted a default rule of recklessness, the Minnesota Criminal Code appeared to adopt a default rule of strict liability. But Minnesota's arguable default rule is stated in less clear terms than the MPC's. At most, it operates by negative implication.

Minnesota's mens rea provisions show hints of MPC influence. Both codes were enacted around the same time, and both were responding to some of the same concerns. But Minnesota chose a much more cautious path. It did not attempt to displace the common law approach, and it did not attempt to create a single robust mens rea framework that could solve mens rea problems across a wide variety of criminal offenses. The MPC adopted a bold new conceptual apparatus for the law of mens rea. Minnesota adopted a more moderate amalgamated scheme that included some modern reforms layered onto the old common law system.

### III. PERSISTENT MENS REA PROBLEMS IN MINNESOTA

Minnesota's cautious approach to mens rea reform in the 1963 Code has led to continuing problems in the criminal law. Many of the same difficulties that afflicted the common law—indeed, the same difficulties that animated the MPC reform efforts—linger in Minnesota today.

#### A. *Terminology Problems*

Minnesota retains confusing mens rea terminology in a variety of areas. Minnesota continues to use a variety of mens rea terms—the definitional mens rea provision in section 609.02 identifies only two possibilities (knowledge and intent), but many criminal statutes in Minnesota nonetheless use other mens rea terms. Some of those statutory mens rea terms are vague and under-defined.

One of the clearest examples of that problem arises in unintentional homicides. A defendant is generally guilty of homicide if he intentionally kills another, but in certain circumstances, a defendant may also be guilty for accidental, unintentional killings. Aside from felony murder, there are two general forms of unintentional homicide: culpable negligence manslaughter and depraved-mind murder. An accidental killing constitutes manslaughter if the defendant's behavior demonstrates "culpable negligence" where the defendant "creates an unreasonable risk, and consciously takes chances of causing death

or great bodily harm to another.”<sup>46</sup> An accidental killing constitutes murder if the defendant’s behavior “evinces a depraved mind, without regard for human life.”<sup>47</sup>

The difference between murder and manslaughter for accidental deaths is supposed to depend on the defendant’s mental state, but it is hard to see any actual difference between the two formulations. Imagine a defendant who casually fires a gun into an ice fishing house, not knowing whether someone is inside. That defendant consciously takes a chance of causing death or serious injury to someone. But does he not also demonstrate a “depraved mind” and show a disregard for human life? For that matter, is it not the case that any time a defendant takes an unreasonable risk that creates a risk of death or great bodily harm, he also shows that he has a “depraved mind”? It is undoubtedly true that lines between degrees of criminal offenses are sometimes necessarily vague, but there should be lines nonetheless.<sup>48</sup> In Minnesota, it is hard to see any difference at all between culpable negligence manslaughter and depraved-mind murder. The problem stems from the code’s use of outmoded mens rea terminology.

Minnesota also retains the confusing and archaic distinction between “specific intent” and “general intent” crimes.<sup>49</sup> That distinction was ridiculed by critics in the early twentieth century because it was used to mean so many disparate things. It was abolished by the MPC. It may be that the drafters of Minnesota’s 1963 Code also intended to abolish it—the phrases “specific intent” and “general intent” appear nowhere in the Minnesota Code. And yet it has been retained by Minnesota courts, primarily for the purpose of determining when the voluntary intoxication defense is available.

Minnesota courts have used the terms themselves inconsistently. In some early cases, the Minnesota Supreme Court used the phrase “specific intent” simply to refer to whatever intent was required by statute, such as the intent requirement for an “intent to defraud” crime.<sup>50</sup> In other cases, Minnesota courts used

46. *Id.* § 609.205(1).

47. *Id.* § 609.195(a).

48. At some point, vagueness in criminal statutes renders statutes unconstitutional. *See Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972).

49. *See State v. Fleck*, 810 N.W.2d 303, 308 (Minn. 2012).

50. *See State v. Higgin*, 257 Minn. 46, 52, 99 N.W.2d 902, 907 (1959); *see also State v. Reps*, 302 Minn. 38, 46–47, 223 N.W.2d 780, 786 (1974) (discussing whether a contractor fraud statute contains any “specific intent” element); *State v.*

“specific intent” to refer to the intent to commit some further crime, such as the intent required in “assault with intent to commit rape.”<sup>51</sup> In recent years, however, courts have used “specific intent” to mean something different. Now it apparently means the intent to cause whatever harmful result is forbidden by a statute, particularly an injury to another person.<sup>52</sup> Minnesota courts have never explained this oddly shifting definition. Of course, Minnesota is not alone in this difficulty:

Sometimes “general intent” is used in the same way as “criminal intent” to mean the general notion of *mens rea*, while “specific intent” is taken to mean the mental state required for a particular crime. Or, “general intent” may be used to encompass all forms of the mental state requirement, while “specific intent” is limited to the one mental state of intent. Another possibility is that “general intent” will be used to characterize an intent to do something on an undetermined occasion, and “specific intent” to denote an intent to do that thing at a particular time and place.<sup>53</sup>

The difference is that, while many jurisdictions have retreated from their old reliance on the distinction between specific and general intent, Minnesota courts continue to employ it, apparently undaunted by the obvious problems.

And definitional problems aside, Minnesota courts have also

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Everson, 286 Minn. 246, 248, 175 N.W.2d 503, 505 (1970) (holding that the only “specific intent” element required by a check fraud statute is the intent to defraud); State v. O’Heron, 250 Minn. 83, 85, 83 N.W.2d 785, 786 (1957) (discussing whether a crime of illegally taking waterfowl has any “specific intent” element); State v. Armour & Co., 118 Minn. 128, 138, 136 N.W. 565, 569 (1912) (discussing the requirement of clarity for strict liability statutes “where acts are penalized without regard to specific intent”).

51. See State v. Johnson, 243 Minn. 296, 299 & n.4, 67 N.W.2d 639, 641–42 & n.4 (1954); see, e.g., State v. Parker, 282 Minn. 343, 357, 164 N.W.2d 633, 642 (1969) (approving an instruction for accomplice liability stating that it requires the “specific intent to do some act the law forbids”); State v. Edwards, 269 Minn. 343, 349, 130 N.W.2d 623, 627 (1964) (stating that a statute criminalizing possession of burglary tools with intent to use them for a crime is a “specific intent” statute); State v. Dumas, 118 Minn. 77, 84, 136 N.W. 311, 314 (1912) (stating that Minnesota’s attempt statute requires the “specific intent” to commit a crime).

52. Fleck, 810 N.W.2d at 308–10; see, e.g., State v. Vance, 734 N.W.2d 650, 656 (Minn. 2007) (“Specific intent means that the defendant acted with the intent to produce a specific result . . . .”); State v. Cogger, 802 N.W.2d 407, 409 (Minn. Ct. App. 2011) (same). But see State v. Austin, 788 N.W.2d 788, 792–93 (Minn. Ct. App. 2010) (noting different definitions of “specific intent”).

53. United States v. Bailey, 444 U.S. 394, 403 (1980) (citation omitted).

applied the terms inconsistently. After years of characterizing assault as a specific-intent crime,<sup>54</sup> the Minnesota Supreme Court recently reversed course. As Teddie Gaitas and Emily Polachek demonstrate, that reversal has the potential to produce a variety of absurd (and presumably unintended) consequences.<sup>55</sup>

Finally, the legislature has been hampered by the lack of intermediate mens rea options. Section 609.02 suggests that “intent” and “knowledge” are the only mens rea options available.<sup>56</sup> The choice between that and strict liability is an all-or-nothing choice. But it makes sense in at least some circumstances to base criminal liability on intermediate levels of culpability, such as negligence or recklessness. Yet recklessness is essentially absent from the Minnesota code. And in the cases where the legislature has tried to create a negligence standard, it has generally done so using a formulation such as “knew or should have known” or “knowing or having reason to know.” In some of those instances, Minnesota courts have simply failed to recognize the apparent negligence standard—and have treated such standards as requiring actual subjective knowledge.<sup>57</sup>

### *B. Filling In Statutory Gaps*

Certain Minnesota statutes employ confusing mens rea terms. But some statutes contain no mens rea terms at all. In such cases, it is left to Minnesota courts to determine whether any mens rea requirement applies, and if so, exactly what the mens rea standard is and for which elements of the offense. Minnesota courts have developed a large body of case law to answer these questions. That case law, however, is hardly a model of consistency or wisdom.

As an initial matter, when a statute is silent as to mens rea, courts must determine whether the crime is in fact a strict liability offense or whether some mens rea requirement should be read into the statute. As discussed above, subdivision 9 of section 609.02 appears to set a default rule of strict liability—that if a statute includes no mens rea term, then no mens rea requirement is

54. *Vance*, 734 N.W.2d at 656–57; *State v. Erdozo*, 578 N.W.2d 719, 722–23 (Minn. 1998); *State v. Lindahl*, 309 N.W.2d 763, 764 (Minn. 1981).

55. Theodora Gaitas & Emily Polachek, *State v. Fleck: The Intentional Infliction of General Intent upon Minnesota’s Assault Statutes*, 39 WM. MITCHELL L. REV. 1480, 1496–1505 (2013).

56. MINN. STAT. § 609.02, subdiv. 9(2)–(3) (2012).

57. *State v. Stevenson*, 637 N.W.2d 857, 861 (Minn. Ct. App. 2002).

intended.<sup>58</sup> But in a departure from their usual “plain meaning” approach, Minnesota courts occasionally ignore the legislatively enacted default rule.<sup>59</sup>

Two cases decided only months apart illustrate the difference. *State v. Loge* involved a statute criminalizing possession of an open bottle in an automobile.<sup>60</sup> *In re Welfare of C.R.M.* involved a statute criminalizing possession of a knife at school.<sup>61</sup> In both cases, the defendants claimed that they did not knowingly possess the contraband; therefore, in both cases, the supreme court had to determine whether any knowledge requirement applied. In *Loge*, the court found no knowledge requirement based on the plain meaning of the statute and the statutory structure.<sup>62</sup> In *C.R.M.*, by contrast, the court read a knowledge requirement into the statute because it was a felony and not a mere “public welfare” offense.<sup>63</sup>

The rule of these cases appears to be that some mens rea requirement will be read into felony (and gross misdemeanor)<sup>64</sup> offenses but not misdemeanor offenses. The justification for such a rule, however, is questionable as a matter of statutory interpretation. The Minnesota Supreme Court has often relied on federal case law as support for its rule,<sup>65</sup> but it is unclear why old federal cases interpreting federal statutes have much bearing on Minnesota statutes, especially in light of the subdivision 9 default. The rule also creates problems when a single statute, such as the order for protection statute, can produce both felony and misdemeanor penalties depending on the circumstances. Moreover, even assuming the rule is justified, it has not been applied consistently. Felony DWI, for example, remains a strict liability offense notwithstanding the stated rule of the case law that felonies must have some mens rea element.<sup>66</sup>

Second, once courts have determined that *some* mens rea requirement applies, they must still determine *what* mens rea requirement applies. That body of law is even more confusing.

58. § 609.02, subdiv. 9(1).

59. In some cases, however, Minnesota courts have applied the strict liability default. *See* *State v. Skapyak*, 702 N.W.2d 331, 333–34 (Minn. Ct. App. 2005).

60. 608 N.W.2d 152 (Minn. 2000).

61. 611 N.W.2d 802 (Minn. 2000).

62. *Loge*, 608 N.W.2d at 155–58.

63. *C.R.M.*, 611 N.W.2d at 808–10.

64. *State v. Ndikum*, 815 N.W.2d 816, 818–20 (Minn. 2012).

65. *See, e.g., id.* at 820.

66. *State v. Smoot*, 737 N.W.2d 849, 853 (Minn. Ct. App. 2007).

The Minnesota Supreme Court's most important recent attempt to answer this type of question came in *State v. Al-Naseer*, a case involving vehicular homicide for leaving the scene of an accident.<sup>67</sup> The statute was silent as to mens rea, but the court quickly rejected the possibility that it might actually be a strict liability offense. To fill in the gap, the court considered five possible mens rea standards.<sup>68</sup> The very fact that five different standards are possible under Minnesota case law shows how indeterminate that case law is. The court ultimately chose one more-or-less sensible standard,<sup>69</sup> but the choice had much more to do with policy preference than with the language of the statute itself. Once again, the case law in the area does not follow ordinary rules of statutory interpretation, and Minnesota courts have not set forth a uniform standard for determining what mens rea standard applies.

Third, courts must also determine whether a statute has only one mens rea requirement or whether there might be multiple mens rea requirements attaching to various elements. Minnesota courts generally assume, where a statute is silent, that it contains at most one mens rea requirement. Put differently, Minnesota courts have generally maintained the common law "offense approach" to mens rea rather than the modern "elements approach." One implication of this approach is that Minnesota courts sometimes assume that there must be some mens rea for the initial line of criminal culpability but that strict liability applies to all aggravating factors.<sup>70</sup>

### C. *Example from Drug Laws*

Minnesota courts' treatment of drug laws illustrates several of these problems. Minnesota statutes make it a crime, for example, to possess any amount of a Schedule I or II controlled substance in a school zone.<sup>71</sup> The statute is entirely silent as to mens rea. In the 1970s, in *State v. Florine*, however, the Minnesota Supreme Court held that all drug possession crimes have an implicit mens rea

67. 734 N.W.2d 679 (Minn. 2007).

68. *Id.* at 684.

69. *Id.* at 687–88.

70. See *State v. Benniefeld*, 678 N.W.2d 42, 48 (Minn. 2004) (requiring the state to prove defendant's knowledge of the possession of an illegal substance but not to prove any mens rea with regard to the location for conviction under a possession in a school zone statute).

71. MINN. STAT. § 152.023, subdiv. 2(4) (2012).



requirement—the defendant must have “actual knowledge of the nature of the substance.”<sup>72</sup> The court’s conclusion was not based on the statute’s plain meaning, or the legislative history, or any interpretive canons, or any case law rule that serious crimes must have some mens rea. Rather, the court simply cited a general criminal law treatise and considered the matter settled.<sup>73</sup>

The phrase “nature of the substance” is not without its own problems. It is not clear, under *Florine*, whether a defendant must know exactly what drug he possessed or merely that a defendant must know that he possessed some illegal substance. Thus the Minnesota Court of Appeals struggled to apply the *Florine* requirement where a defendant knew he possessed khat but claimed not to know that khat contains cathinone, a controlled substance.<sup>74</sup> It is even more difficult to apply *Florine*’s “nature of the substance” standard to drug mixtures, especially now that the Minnesota Supreme Court held that accidental drug combinations, such as bong water, constitute “mixtures” for the purposes of the drug statutes.<sup>75</sup> In short, the supreme court read a mens rea requirement into the statute with very little analysis, but the requirement it chose is indeterminate and thus continues to produce litigation today.

*Florine* addressed the baseline mens rea element regarding the drug itself. Three decades later, in *State v. Benniefeld*, the court was faced with the question of whether there was an additional mens rea requirement for the school-zone element.<sup>76</sup> In *Benniefeld*, the defendant claimed that he had only accidentally wandered into a school zone.<sup>77</sup> The court held, however, that the school zone element is a strict-liability element because one mens rea requirement is enough: “Having established that mens rea is an

72. *State v. Florine*, 303 Minn. 103, 104, 226 N.W.2d 609, 610 (1975).

73. *Id.* (citing WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 25 (1972)).

74. *State v. Ali*, 775 N.W.2d 914, 918 (Minn. Ct. App. 2009) (“Our supreme court has not had occasion to clarify whether Minnesota’s actual-knowledge requirement may be satisfied by proof that the defendant knew that the substance he possessed was illegal.”).

75. *State v. Peck*, 773 N.W.2d 768, 773 (2009). *Peck* has been partially, but only partially, overruled by subsequent statutory amendment. See § 152.022, subdiv. 2(b) (“For the purposes of this subdivision, the weight of fluid used in a water pipe may not be considered in measuring the weight of a mixture except in cases where the mixture contains four or more fluid ounces of fluid.”).

76. 678 N.W.2d 42 (Minn. 2004).

77. *Id.* at 45.

implied element in the statute with respect to possession, we see no basis for requiring the state to demonstrate an additional mens rea element with respect to location.”<sup>78</sup> Once again, it is hard to see how that rationale is justified in terms of ordinary principles of statutory interpretation.

It is similarly doubtful whether the court’s “one mens rea element is enough” rationale makes sense as a policy matter. To see why, consider three hypothetical defendants, all of whom possessed a small amount of marijuana. Defendant A walked down one street, 600 feet from a school. Defendant B walked down a different street and unwittingly came within 400 feet of a school. Defendant C went looking for a school, in hopes of finding a young user to share his drugs. Defendant C is more culpable than Defendant A or Defendant B, and yet the Minnesota courts’ approach to mens rea treats Defendant B as equivalently culpable to Defendant C. Because proximity to a school is a strict-liability element, Defendant B is punished much more severely based on pure happenstance. To be sure, there are colorable policy reasons for imposing strict liability based on proximity to a school. The point is simply that the criminal statutes themselves give no indication that the legislature made a choice to impose strict liability—it has simply been imposed, almost blithely, by the Minnesota Supreme Court, just as it almost blithely created a mens rea requirement for the “nature of the substance” decades ago.

The examples from Minnesota’s drug laws illustrate the larger point about Minnesota’s approach to mens rea. Lacking clear guidance from criminal statutes themselves, Minnesota courts struggle to determine whether statutes have mens rea requirements, and if so, what they are. But the mens rea doctrine developed by Minnesota courts is hardly a model of consistency. In sum, despite the efforts of Pirsig and the 1963 reformers to rationalize Minnesota’s mens rea law, it remains as confusing as ever.

#### IV. PROPOSALS

Another major reform and recodification effort is unlikely for the foreseeable future. It would be difficult, politically and otherwise, to try to integrate the entire MPC framework into the Minnesota Criminal Code. But a few smaller reforms, borrowed

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78. *Id.* at 48.

from the MPC, could lead to a more coherent mens rea doctrine in Minnesota over time.

A. *Proposal #1—Adding to the Mens Rea Menu*

As a starting point, Minnesota should add to its menu of mens rea options. Rather than a binary choice between intent or knowledge on one hand and strict liability on the other, the code should make intermediate options available. It makes sense to simply borrow the definitions of recklessness and negligence from the MPC. Thus, the mens rea definitions provision of section 609.02 should be amended. That provision currently reads:

Subd. 9. *Mental state.*

(1) When criminal intent is an element of a crime in this chapter, such intent is indicated by the term “intentionally,” the phrase “with intent to,” the phrase “with intent that,” or some form of the verbs “know” or “believe.”

(2) “Know” requires only that the actor believes that the specified fact exists.

(3) “Intentionally” means that the actor either has a purpose to do the thing or cause the result specified or believes that the act performed by the actor, if successful, will cause that result. In addition, except as provided in clause (6), the actor must have knowledge of those facts which are necessary to make the actor’s conduct criminal and which are set forth after the word “intentionally.”

(4) “With intent to” or “with intent that” means that the actor either has a purpose to do the thing or cause the result specified or believes that the act, if successful, will cause that result.

(5) Criminal intent does not require proof of knowledge of the existence or constitutionality of the statute under which the actor is prosecuted or the scope or meaning of the terms used in that statute.

(6) Criminal intent does not require proof of knowledge of the age of a minor even though age is a material element in the crime in question.<sup>79</sup>

It should be amended to read as follows:

Subd. 9. *Mental state.*

(1) The legislature may use any of the following terms, or

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79. § 609.02, subdiv. 9.

variants thereof, to indicate that some mental state is an element of an offense under this chapter.

(2) “Intentionally” or “with intent to” or “with intent that” means that the actor either has a purpose to do the thing or cause the result specified or believes that the act performed by the actor, if successful, will cause that result. In addition, except as provided in clause (8), the actor must have knowledge of those facts which are necessary to make the actor’s conduct criminal and which are set forth after the word “intentionally.”

(3) “Knowingly” or “know” requires only that the actor believes that the specified fact exists.

(4) “Recklessly” requires that the actor consciously disregard a substantial and unjustifiable risk that his conduct will do the thing or cause the result specified, or that the specified attendant circumstance exists.

(5) “Negligently” requires that the actor should be aware of a substantial and unjustifiable risk that his conduct will do the thing or cause the result specified, or that the specified attendant circumstance exists.

(6) When the law provides that negligence suffices to establish an element of an offense, such element also is established if a person acts intentionally, knowingly, or recklessly. When recklessness suffices to establish an element, such element also is established if a person acts intentionally or knowingly. When acting knowingly suffices to establish an element, such element also is established if a person acts intentionally.

(7) Criminal intent does not require proof of knowledge of the existence or constitutionality of the statute under which the actor is prosecuted or the scope or meaning of the terms used in that statute.

(8) Criminal intent does not require proof of knowledge of the age of a minor even though age is a material element in the crime in question.

These changes should be uncontroversial. The definitions of “intentionally” and “knowingly” remain the same. The only technical change suggested is that the current clauses (3) and (4), for definitions of “intentionally” and “with intent that,” be combined since they are substantially redundant. The amendment would then add definitions of “recklessly” and “negligently,”

borrowed from the MPC.<sup>80</sup> Also borrowed from the MPC is the technical hierarchy provision—that negligence is the lowest level and that if a statute specifies a negligence mens rea, a defendant is also guilty if he acts intentionally, knowingly, or recklessly.<sup>81</sup>

By themselves, these changes would not affect any current crimes. As a result, by themselves, these changes would not affect the criminal law in Minnesota one iota. What they would do, however, would be to give the legislature additional options when drafting offenses in the future. The legislature would never be *required* to choose recklessness or negligence as a mens rea standard for a criminal offense, but it could do so. For at least some offenses, such standards could be appropriate. For example, various forms of assault could be rewritten to require recklessness rather than intent. After all, if a defendant engages in highly risky behavior that causes injury to another, arguably he should be guilty of some offense (just as a defendant who engages in highly risky behavior causing death is guilty of some form of homicide).

But regardless of whether recklessness or negligence makes sense for any particular offense, the point is simply that having additional clearly defined options would make it easier for the legislature to draft clear criminal laws in the future.

#### *B. Proposal #2—New Default for Future Crimes*

The MPC has a clear default rule; Minnesota has none. For reasons described above, our lack of clear default has created unnecessary confusion in the case law. To the extent that clause (1) of section 609.02, subdivision 9, was intended as a strict liability default, it has been, at least sometimes, ignored by the courts. It would be helpful to have a clearer default rule for future crimes. Once again, the MPC can serve as a model. Section 609.02 should be amended to add a new subdivision with a recklessness default:

##### *Subd. 9a. Default mental state.*

For all new offenses enacted after July 31, 2013, if the mental state required to establish any material element of an offense is not prescribed by law, such element is established if a person acts purposely, knowingly, or recklessly with respect thereto.

80. See MODEL PENAL CODE § 2.02(2)(c)–(d) (1962).

81. *Id.* § 2.02(5).

The proposed default rule would apply only to newly enacted offenses. It would be logistically difficult and politically controversial to apply the default rule to existing offenses. And in any event, for most existing offenses, the mens rea requirements have already been settled by case law or otherwise. Consequently, the default rule, by itself, would not affect any current crimes.

Moreover, the default rule would not necessarily affect any future crimes. The default rule would not require recklessness for any offense. Rather, it would simply state that in cases where the legislature fails to specify a mens rea requirement for an element of an offense, recklessness (or above) fills in as a default. The legislature would always retain the power to choose a different mens rea standard—intent, knowledge, negligence, or strict liability. In short, the default rule would not counsel any mens rea for any offense. Rather, it would only function in instances of legislative inattention.

The rule would nonetheless be valuable for both the legislature and Minnesota courts. For the legislature, it would serve as a backdrop mens rea—and it could function as a helpful reminder that whenever the legislature chooses to enact a new crime, it should carefully consider and specify the appropriate mens rea level for each element of the offense. The legislature is perfectly capable of specifying mens rea. It has, for example, clearly specified that there is no mens rea required for the element of age in most statutory rape offenses.<sup>82</sup> It should do the same for all offenses. A default rule could prod the legislature to be more clear in the future. That would, in turn, benefit courts. A clear default rule would lead to more predictable results and less litigation. Minnesota's confusing doctrine about whether and how to fill in a mens rea standard could be allowed to fade into history.

### *C. Proposal #3—Adopt the Elements Approach to Mens Rea*

The proposed amendment, subdivision 9a above, would also adopt the elements approach to mens rea. In other words, it would clarify that the default recklessness applies to each element of the offense, not simply to the offense as a whole. Again, that would not by itself require that the legislature enact multiple mens rea requirements for an offense. The legislature would always have the

82. See, e.g., MINN. STAT. § 609.342, subdiv. 1(a) ("Neither mistake as to the complainant's age nor consent to the act by the complainant is a defense . . .").

ability to specify a mens rea standard for one element but not another. Rather, the default rule would only serve to clarify that each element *can* have a mens rea and that when no mens rea is specified, courts should fill in recklessness.

Some will object that having multiple mens rea requirements for a single offense will lead to confusion. But it is already true that some offenses in Minnesota have multiple mens rea requirements. For example, even the simple crime of theft has at least three different mens rea requirements.<sup>83</sup> Juries in theft cases are already instructed that they must find three different mens rea facts to be true beyond a reasonable doubt.<sup>84</sup> Those requirements have not caused substantial problems, nor have they made it impossible for prosecutors to prove theft. Nor is it the case that the elements approach has caused major problems in jurisdictions that have adopted the MPC mens rea framework.

Once again, the point of the reform is not to take a policy position that any particular crime *should* have multiple mens rea requirements. The purpose is simply to work toward a system where legislators will indicate mens rea requirements more clearly, and courts will have a more sensible system for handling interpretive disputes when the legislature fails to speak clearly. Adoption of the elements analysis would help to “provide fair notice of the scope of the prohibition, eliminate the need for judicial construction that may expand or reduce that scope, and delineate the scope so as to limit the arbitrary administration and application of criminal laws.”<sup>85</sup>

## V. CONCLUSION

In retrospect, it might have been better if the Minnesota Criminal Code of 1963 had adopted the MPC mens rea framework to a greater extent. Maynard Pirsig, the Minnesota Code’s chief drafter, noted that then-existing statutes and doctrine had resulted in “much confusion and uncertainty as to what mental state is intended.”<sup>86</sup> But Pirsig’s attempted revisions did not go far enough, and as a result, confusion and uncertainty persist fifty years later.

A few small reforms, however, could alleviate many of those

83. See *id.* § 609.52, subdiv. 2(a).

84. See 10 MINN. DIST. JUDGES ASS’N, MINNESOTA PRACTICE: JURY INSTRUCTIONS GUIDE—CRIMINAL § 16.02 (5th ed. 2006).

85. Robinson & Grall, *supra* note 15, at 703–04 (citations omitted).

86. Pirsig, *supra* note 35, at 422.

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problems. By inching toward an MPC mens rea framework, at least for newly enacted offenses, Minnesota could produce a more sensible criminal law. The sort of vast, code-wide reforms pursued by Wechsler and Pirsig may be a thing of the past, but incremental improvements in the criminal code are still possible.